JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

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APPEAL AND ERROR.

State v. *Ricks* (Idaho), 180 Pac. 257. *Effect of impossibility of obtaining a transcript of testimony in trial court.*

Appellants were convicted of crime in the district court, and thereafter took the usual proceedings to have their case heard in this court on appeal; but the court reporter died without preparing a transcript of the testimony adduced at the trial. It is shown that a transcript of the testimony cannot be obtained. They have filed a motion in this court for an order to set aside the judgment of conviction and grant them a new trial on the ground that they cannot be heard on appeal from the judgment rendered.

Held, that the court has no power to grant the motion, in the exercise of either its appellate or original jurisdiction as conferred by Const. art. 5, sec. 9.

Chapman v. *State* (Ga.), 98 S. E. 243. *Effect of comment on facts by trial court.*

Althought the evidence demands a verdict of guilty, the law commands that it be set aside. The trial judge should have kept dumb, as the statute requires. It was not at all essential to his ruling upon the motion made by counsel for defendant for him to express himself on the facts as he did. We are enjoined in mandatory terms to set this conviction aside. Mandatory statutes must be obeyed, not evaded.

While, ordinarily, it is reversible error for a trial judge, in any case, in his charge of the jury, or during its progress, within the hearing of the jury, to express or intimate his opinion as to what has or has not been proved (Civ. Code, 1910, Sec. 4863; Pen. Code, 1910, Sec. 1058), it is not a violation of the statute, where such expression or intimation of opinion occurs when the judge is discussing with counsel the admissibility of testimony, the propriety of a non-suit, the discharge of a defendant for the lack of evidence to convict, the direction of a verdict, or similar matters in the progress of the trial, or is explaining his rulings upon questions of this nature. Especially is this true where the party complaining of such expression is the one who invoked the ruling which occasioned it.

Stephens, J., dissenting.

CONSTITUTIONAL LAW.

Ex parte Dunkerton (Kans.), 179 Pac. 347. *State penal farm.*

The purpose of the act of 1917 is to ameliorate the condition of women who have been convicted of an offense punishable by imprisonment. Under the act women are not subject to the debauching influence of the county jail and of the penitentiary and of the close confinment therein, but are placed in a field where labor is pleasant and restraint is limited, and where the evil influence of other persons convicted of crime is minimized. The act seeks

to improve, to educate, and to build up, not to punish. The court is asked to say that the law is unconstitutional because in accomplishing these objects it imposes restraint on women different from that imposed on men. *Morgan* v. *State,* 179 Ind. 300, 101 N. E. 6, is cited by the petitioner. There, the Supreme Court of Indiana held that a statute which prescribed a treatment of men acquitted of crime on the ground of insanity, different from that accorded women thus acquitted, denied to women the equal protection of the law, and contravened the Fourteenth Amendment to the Constitution of the United States. The reasoning in that case is not convincing. The legislature may very properly determine that women convicted of crime shall be less severely punished than men convicted of the same crime. The number of women that commit crimes is much smaller than the number of men committing similar crimes, and that fact may be taken into consideration by the legislature, and punishment may be prescribed which recognizes that difference.

Chapter 298 of the Laws of 1917, establishing a state industrial farm for women, does not violate section 1 of the Fourteenth Amendment to the Constitution of the United States nor section 1 of the Bill of Rights of the Constitution of the State of Kansas, and does not deny the equal protection of the law to women convicted of offenses punishable by imprisonment.

Barbour v. *Georgia,* 39 Sup. Ct. Repr. 316. *Illegal possession of intoxicating liquors.*

The application of Laws, Ga. (Ex. Sess.), 1915, pt. 1, tit. 2, secs. 16 and 30, making it illegal to have in possession more than one gallon of vinous liquor, to the possession of liquor acquired after the law was enacted, but before it became effective, does not render that act invalid as depriving of property without due process of law.

Frohwerk v. *U. S.,* 39 Sup. Ct. Repr. 249. *Espionage act: Freedom of speech.*

Articles published in German language newspaper relative to Wall Street's having forced country into European war, to England's controlling the country, and to the draft as a measure it was excusable to resist, *held* to furnish basis for conviction of writer on count charging conspiracy between him and another, both having been engaged in preparation and publication of newspaper, to violate Espionage Act, June 15, 1917, section 3 (Comp. St. 1918, sec. 10212c).

First Amendment to Constitution, while prohibiting legislation against free speech, as such, cannot have been, and obviously was not, intended to give immunity for every possible use of language.

CONTEMPT.

Ex parte Hudgings, 39 Sup. Ct. Repr. 337. *Power to punish.*

That perjury is a crime, for which one committing it may be tried and punished, does not prevent it, when committed in the presence of a court, being the subject-matter of punishment for contempt; exceptional conditions justifying.

While power to punish for contempt committed in the presence of the court, existing within the limits of and sanctioned by the Constitution, is not controlled by the limitations of the Constitution as to modes of accusation and methods of trial generally safeguarding the rights of the citizen, judicial

authority is not exempt from constitutional limitations; the great and only purpose of the power being to secure judicial authority from obstruction in the performance of its duties to the end that means appropriate for the preservation and enforcement of the Constitution may be secured.

An obstruction to the performance of judicial duty from an act done in the presence of the court is essential to power to punish for contempt, though the act be perjury.

Mr. Justice Pitney dissenting.

ESPIONAGE ACT.

Debs v. *U. S.*, 39 Sup. Ct. Repr. 252. *Obstructing recruiting.*

Defendant, indicted for obstructing and attempting to obstruct the draft, having just before his speech, complained of, stated that he approved of the Socialist Anti-War Proclamation and Program, adopted at St. Louis in April, 1917, which recommended opposition by all means to the war, it was admissible as evidence that, if in his speech he used words tending to obstruct recruiting, he meant that they should have that effect.

If a purpose of defendant's speech, even though incidental, was, as the jury were warranted in finding, to oppose, not only war in general, but the existing war, and the opposition was so expressed that its natural effect would be to obstruct recruiting, and that was intended, and in all the circumstances would be its probable effect, it would not be protected by reason of it being part of a general program and expressions of a general and conscientious belief.

FORGERY.

McIntosh v. *State* (Ga.), 98 S. E. 555. *Materiality of figures in check.*

For an alteration of a writing to be the basis of a prosecution for forgery the alteration must be a material one.

(a) "The figures in a check, following the words in the body thereof denoting the sum called for, are not a material part of the instrument, the words being controlling in determining the legal effect."

HARRISON DRUG ACT.

U. S. v. *Doremus*, 39 Sup. Ct. Repr. 214. *Validity.*

Harrison Narcotic Drug Act, Section 2 (Comp. St. Sec. 6287h), aiming to confine, by imposition of penalties, sales of narcotic drugs to registered dealers, to those dispensing them as physician and those coming to dealers with legitimate prescriptions of physicians, inserted in an act specifically providing for the raising of revenue, by excise tax on such dealers and others named in section 1 (sec. 6287g), has such relation to facilitating the collection of the revenue as to be within the power of Congress under the authority given it by Const. art. 1, sec. 8, to impose excise taxes, and is not a mere attempt to exercise a power not delegated, the reserved police power of the states.

The chief justice, Mr. Justice McKenna, Mr. Justice Van Deventer, and Mr. Justice McReynolds dissenting.

INSANITY.

People v. *Morisawa* (Calif.), 179 Pac. 888. *Irresistible impulse.*

In order to establish defense of insanity in a criminal prosecution, it must be proved by preponderance of evidence that at time of committing act accused was laboring under such a defect of reason from disease of mind, temporary or otherwise, as not to know nature and quality of act he was doing, or, if he did know it, that he did not know he was doing what was wrong; and an irresistible impulse to commit an act which one knows is wrong or unlawful does not constitute the insanity which is a legal defense.